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JULIO CESAR PALMAZ and AMALIA B. PALMAZ,  
8 TRUSTEE OF THE AMALIA B. PALMAZ LIVING TRUST  
9

10 BEFORE THE STATE WATER RESOURCES CONTROL BOARD  
11

12 IN THE MATTER OF THE PETITION OF:  
13 JULIO CESAR PALMAZ and AMALIA B.  
14 PALMAZ, TRUSTEE OF THE AMALIA B.  
15 PALMAZ LIVING TRUST

SWRCB/OCC File

**PETITION FOR REVIEW AND  
REQUEST FOR HEARING;  
REQUEST FOR IMMEDIATE STAY**

(Cal. Water Code § 13320; Cal. Code  
Regs. tit. 23, §§ 2050 & 2053)

16  
17  
18 **INTRODUCTION**

19 JULIO CESAR PALMAZ and AMALIA B. PALMAZ, TRUSTEE OF THE AMALIA B.  
20 PALMAZ LIVING TRUST (collectively "PalmaZ" or "Petitioners") hereby appeal the  
21 Requirement for Technical Information ("Technical Report Order") issued by the Executive  
22 Officer of the San Francisco Bay Regional Water Quality Control Board ("Regional Board") on  
23 April 10, 2009. This Petition for Review and Request for Hearing (collectively, the "Petition") is  
24 brought pursuant to the provisions of California Water Code section 13320 and Title 23 of the  
25 California Code of Regulations sections 2050 and 2053.  
26  
27  
28

1                                    **PETITION FOR REVIEW AND REQUEST FOR HEARING**

2    **I.      NAME AND ADDRESS OF PETITIONERS**

3                                    Dr. Julio & Amalia Palmaz  
4                                    200 Patterson Ave, Apt. 608  
5                                    San Antonio, TX 78209  
6                                    210-462-6857

7    **II.     SPECIFIC ACTION OF THE REGIONAL BOARD**

8                                    This Petition appeals Requirement for Technical Information ("Technical Report Order")  
9                                    issued by the Executive Officer of the San Francisco Bay Regional Water Quality Control Board  
10                                   ("Regional Board") on April 10, 2009. A true and correct copy of the Technical Report Order is  
11                                   attached as **Exhibit A**.

12   **III.    DATE OF THE REGIONAL BOARD ACTION**

13                                   The Regional Board's action was taken on April 10, 2009.

14   **IV.    STATEMENT OF REASONS WHY THE REGIONAL BOARD ACTION**  
15   **WAS INAPPROPRIATE AND IMPROPER**

16                                   The issuance of the Technical Report Order was beyond the authority of the Regional  
17                                   Board and was inappropriate, improper and not supported by the record for the following reasons:

- 18                                   •      The Technical Report Order violates California Water Code section 13267.  
19                                   •      The Regional Board failed to make appropriate findings based on substantial  
20                                   evidence supporting the issuance of the Technical Report Order.  
21                                   •      The Technical Report Order violates Palmaz's constitutional rights to due process  
22                                   and equal protection.

23   **V.     MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED**

24                                   Palmaz is an aggrieved person within the meaning of California Water Code section  
25                                   13320, because the Technical Report Order requires Palmaz to prepare and submit reports  
26                                   without consideration of their economic or operational feasibility or any beneficial need for such  
27                                   reports. The Technical Report Order subjects Palmaz to the risk of penalties or other civil liability  
28                                   if the Regional Board believes Palmaz has not complied with the order. Technical Report Order  
at 1.

1 **VI. SPECIFIC ACTION REQUESTED BY THE PETITIONERS**

2 Palmaz respectfully requests that the State Board immediately stay the effect of and  
3 rescind the Technical Report Order. Palmaz reserves the right to further request any and all  
4 actions authorized in California Water Code section 13320.

5 **VII. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF**  
6 **PETITION**

7 **A. Factual Background**

8 Issued on April 10, 2009, the Technical Report Order sought certain "technical  
9 information" related to Palmaz Vineyard and Winery, specifically (1) the total cost of building of  
10 winery ("Winery Property") and (2) the name of any grape varieties currently cultivated on the  
11 1400 foot elevation vineyard ("1400 Vineyard Property"), and their current and projected yields.  
12 Technical Report Order at 1. The Technical Report Order required such information by May 1,  
13 2009. *Id.*

14 The 1400 Vineyard Property is currently subject to a Cleanup and Abatement Order No.  
15 R2-2007-0019 ("CAO"), issued on March 21, 2007, by the Regional Board.<sup>1</sup> In brief, in 2001,  
16 Napa County authorized the construction of a wine cave at the Winery Property, under the  
17 condition that all the tailings from the project remain on the property. The cave tailings were  
18 subsequently deposited on the 1400 Vineyard Property, which the County inspected and approved  
19 in 2004. The Department of Fish and Game ("DFG") conducted an investigation of the 1400  
20 Vineyard Property and concluded that some of the work affected Hagen Creek on the property in  
21 violation of certain provisions of the California Fish and Game Code and referred the matter to  
22 the Napa County District Attorney. Palmaz resolved these issues with DFG and the County.  
23 Nonetheless, the Regional Board issued the CAO in 2007, alleging, among other items, that  
24 Palmaz discharged waste to waters of the State. The CAO ordered Palmaz to submit the  
25 following, among other things, extensive technical reports, detailing the past and present  
26 condition of the property and all constructions activities conducted on the site; and a corrective

27 <sup>1</sup> Palmaz timely petitioned for review of the CAO. This Board's review of that order is  
28 currently being held in abeyance until May 31, 2009.

1 action workplan, outlining actions to reconstruct, revegetate, restore and remediate wetlands and  
2 any other waters of the State on the property, as well as a proposal to provide compensatory  
3 habitat to mitigate the temporal impacts of the filling of the wetlands. Since issuance of the CAO,  
4 Palmaz has sought to work with the Regional Board staff to address the requirements of the CAO,  
5 submitting technical reports and workplans as required by the CAO. Throughout this process,  
6 Palmaz has tried to reach a science-based agreement with staff on the extent of waters of the State  
7 filled by cave tailings.

8 On April 29, 2009, Palmaz responded to the Technical Report Order, specifically seeking  
9 reconsideration of the Order (attached as **Exhibit B**). Notwithstanding and without waiving any  
10 objections to the failure of the Technical Report Order to comply with the requirements of section  
11 13267(b), Palmaz also provided information, as a show of good faith and cooperation, on the  
12 costs of disposal of the cave tailings on the 1400 Vineyard Property and the grapes currently  
13 grown on, and current and projected yields from, that vineyard.

14 To avoid the need for this Petition, Palmaz requested a response by May 6, 2009. The  
15 Regional Board has yet to act on the reconsideration request, necessitating the filing of this  
16 Petition.

## 17 **B. Argument**

### 18 **1. Standard and Scope of Review**

19 In reviewing a decision of the Regional Board, the State Board is not subject to the same  
20 strict standards that govern court review of administrative actions. *See* Cal. Water Code § 13320;  
21 *In the Matter of the Petition of Exxon Co., USA*, Order No. WQ 85-7 at 14 (Aug. 22, 1985).  
22 Rather, under the California Water Code, the State Board must consider both the record before  
23 the Regional Board and “any other relevant evidence” when reviewing the order. Cal. Water  
24 Code § 13320(b). The State Board reviews the Regional Board’s decision under an “appropriate  
25 or proper” standard Cal. Water Code § 13320(c). If the State Board finds that the action was  
26 inappropriate or improper, the State Board has several options, including directing the Regional  
27 Board to take appropriate action, referring the matter to another state agency with jurisdiction,  
28 taking the appropriate action itself or taking any combination of the above actions. *Id.*

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1 Consequently, the State Board is not bound by the decision of the Regional Board, but instead  
2 “[t]he scope of review . . . appears to be closer to that of independent review.” Order No. WQ 85-  
3 7 at 14. To uphold the Regional Board’s action, the State Board must conclude, based on its own  
4 independent review of the record, that it was “based on substantial evidence.” *Id.*

5 **2. The Technical Report Order Fails to Comply with California**  
6 **Water Code § 13267**

7 Under California Water Code section 13267, before it can order the submission of any  
8 technical reports, the Regional Board must “provide the person with a written explanation with  
9 regard to the need for the reports” and “identify the evidence that supports requiring the person to  
10 provide the reports.” Cal. Water Code § 13267(b)(1). The Regional Board must further establish  
11 that “[t]he burden, including costs, of these reports . . . bear[s] a reasonable relationship to the  
12 need for the report and the benefits to be obtained from the reports.” *Id.*

13 The Technical Report Order fails to comply with *any* of these basic requirements of  
14 section 13267. There is a no “explanation with regard to the need for the reports.” *Id.* The  
15 Technical Report Order fails “identify the evidence that supports requiring [Palmaz] to provide  
16 the reports.” *Id.* Moreover, the Regional Board fails to address how the “burden, including costs,  
17 of the[] reports . . . bear[s] a reasonable relationship to the need for [them] and the benefits to be  
18 obtained from [them].” *Id.* Accordingly, the Technical Report Order violates section 13267 and  
19 should be rescinded.

20 **3. The Technical Report Order Is Not Based on Substantial**  
21 **Evidence**

22 Even if the Technical Report Order complied with the requirements of section 13267  
23 (which it does not), there is no evidentiary support for its issuance.

24 In reviewing a reporting order entered by a Regional Board pursuant to section 13267, the  
25 State Board first must determine if the party to whom the order is directed has discharged, is  
26 discharging, is suspected of discharging, or proposes to discharge waste. If so, the State Board  
27 must then examine if the burden, including costs of preparing the required reports, bears a  
28 reasonable relationship to the need for the report and the benefits to be obtained. Cal. Water  
Code § 13267(b)(1). The Technical Report Order fails to satisfy either step.

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1 Here, the Technical Report Order seeks information about the Winery Property. Yet, the  
2 Regional Board has not made any claim in the CAO, the Technical Report Order or any other  
3 document of any discharge or suspected discharge of waste on the Winery Property; rather, the  
4 focus of the CAO has been the 1400 Vineyard Property. Even if there was such an allegation,  
5 there is no conceivable explanation for why the information sought—the cost of constructing the  
6 winery on the Winery Property—would be related to any current or threatened discharge. Indeed,  
7 the information requested appears to serve no purpose other than to harass Palmaz. Accordingly,  
8 there is no evidence supporting the issuance of the Technical Report Order directed at activities  
9 on the Winery Property.

10 There is also no substantial evidence that the costs of preparing the required reports bear a  
11 reasonable relationship to the need for the reports and the benefits to be obtained. Given that  
12 there is no need—expressed or otherwise—for the reports in the first place, no amount of costs  
13 for preparing the requested information would be justified. Similarly, as there is no benefit—  
14 again, expressed or otherwise—to be obtained from the reports, under no cost-benefit analysis  
15 would the reports be warranted. However, even if there was a need for or benefit from obtaining  
16 some information on past activities on the Winery Property (for example, the costs for the  
17 removal of the cave spoils), the overbroad request for cost information for *all* construction  
18 associated with the winery imposes an unnecessary and undue burden on Palmaz. The winery  
19 was constructed a number of years ago. The information requested is not readily available and  
20 would have to be reconstructed for the sole purpose of responding to the Technical Report Order.  
21 When coupled with the arbitrary and unreasonably short timeframe for responding to the request  
22 (which was approximately two weeks when the time for mail delivery is factored in), responding  
23 to the Technical Report Order imposes a significant hardship and burden on Palmaz unsupported  
24 by any conceivable need for or benefit of the information. The Technical Report Order should be  
25 rescinded.

1                   **4.     The Technical Report Order Violates Palmaz's Constitutional**  
2                   **Rights**

3           The Technical Report Order inappropriately singles out Palmaz for imposition of special  
4 burdens and requirements. As with the earlier the CAO, the Regional Board is intentionally  
5 singling out Palmaz and treating it differently from other similarly situated property owners, even  
6 though there is no rational basis for the difference in treatment. *See Village of Willowbrook v.*  
7 *Olech*, 528 U.S. 562, 564 (2000). In light of these circumstances, the imposition of the Technical  
8 Report Order is, on its face, irrational and arbitrary.

9           Moreover, given that the Regional Board fails to even provide lip service to the  
10 foundational requirements of section 13267, it is clear that the Regional Board's purpose in  
11 issuing the Technical Report Order was to harass Palmaz for having the temerity to question the  
12 jurisdictional overreaching in the CAO and its interpretation. The Technical Report Order is  
13 dated April 10, 2009, only three days after Palmaz sent yet more technical reports showing that  
14 the Regional Board's claim of the extent of waters of the State on the 1400 Vineyard Property is  
15 legally and factually wrong. (See letter attached as **Exhibit C.**) Such misuse of the Regional  
16 Board's powers raises serious due process concerns. *See Clark v. City of Hermosa Beach*, 48 Cal.  
17 App. 4th 1152, 1185 (1996) ("Substantive due process prevents governmental power from being  
18 used for purposes of oppression, or abuse of government power that shocks the conscience, or  
19 action that is legally irrational in that it is not sufficiently keyed to any legitimate State interest.");  
20 *see also Dodd v. Hood River County*, 59 F.3d 852, 864 (9th Cir. 1995) ("A substantive due  
21 process claim requires proof that the interference of property rights was irrational and arbitrary.").

22           Because there is no factual basis or legal authority for imposition of the Technical Report  
23 Order, it would necessarily be irrational and arbitrary, having no connection to a legitimate public  
24 purpose. Accordingly, the Technical Report Order violates Palmaz's equal protection and  
25 substantive due process rights and should be rescinded.

26           **VIII. LIST OF INTERESTED PARTIES**

27           See attached service list.  
28

1 **IX. STATEMENT THAT COPIES OF THIS PETITION HAVE BEEN SENT TO**  
2 **THE REGIONAL BOARD**

3 Copies of this petition have been served on the San Francisco Bay Regional Water Quality  
4 Control Board. Please see the Proof of Service attached hereto.

5 **X. REQUEST FOR HEARING**

6 Palmaz requests that the State Board hold a hearing in this matter.

7 **XI. STATEMENT OF ADDITIONAL EVIDENCE**

8 In addition to the documents attached to this Petition, Palmaz reserves the right to present  
9 at the hearing on its Petition additional evidence that includes, but is not limited to, the following:

- 10 • Correspondence and communications with the Regional Board staff regarding the  
11 Technical Report Order and its requirements.

12 This evidence is in addition to that cited and referenced in this Petition. There was no  
13 hearing before the Regional Board on whether the Technical Report Order that is the subject of  
14 this Petition should issue.

15 Respectfully Submitted,

16 Dated: May 7, 2009

EDGAR B. WASHBURN  
CHRISTOPHER J. CARR  
SHAYE DIVELEY  
MORRISON & FOERSTER LLP

17  
18  
19 By: 

20 Christopher J. Carr

21 Attorneys for Petitioners JULIO  
22 CESAR PALMAZ and AMALIA B.  
23 PALMAZ, TRUSTEE OF THE  
24 AMALIA B. PALMAZ LIVING  
25 TRUST  
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## **I. FAILURE TO GRANT THE STAY WILL RESULT IN SUBSTANTIAL HARM TO PALMAZ**

As explained in the accompanying declaration, Palmaz, in good faith, attempted to provide information in response to the request. Palmaz did not provide all the information requested for two reasons: (1) the Regional Board's overbroad request sought proprietary information that could not conceivably be related to any current or future discharge of waste; and (2) the deadline for the submission of the information was unreasonably and inexplicably expedited, so that Palmaz had only about two weeks to respond.<sup>2</sup> Even if Palmaz could have provided the information within the arbitrary time frame, compliance with the Technical Report Order would have required the submission of confidential information that could not be undone if Palmaz is successful on this Petition. As the Regional Board is threatening to assess penalties based on the Order—which is completely lacking in foundation and legal support—a stay is necessary to avoid this significant risk of harm to Palmaz during the pendency of the State Board's review of the matter.

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1 **II. INTERESTED PERSONS AND THE PUBLIC INTEREST WILL NOT BE SUBSTANTIAL**  
2 **HARMED IF A STAY IS GRANTED**

3 The Technical Report Order is unnecessary and no public harm will result if it is stayed.  
4 As explained in the accompanying Petition, there is no need for the Technical Report Order—the  
5 Order itself states no need and there is no arguably relationship between the information  
6 requested and any current or threatened discharge of waste. Accordingly, the public interest  
7 would not be harmed by a stay of the Technical Report Order.

8 **III. SUBSTANTIAL QUESTIONS OF FACT AND LAW EXIST**

9 The central question to be decided in this Petition is whether the Technical Report Order  
10 complies with California Water Code section 13267. The Petition also seeks review of whether  
11 the Order is supported by substantial evidence or, as is more likely the case, was issued by the  
12 Regional Board to harass Palmaz. This issue presents substantial concerns of due process and the  
13 proper exercise of administrative powers. A stay will permit the time needed to adequately and  
14 fully address these questions and others regarding the underlying factual and legal bases for the  
15 Technical Report Order.

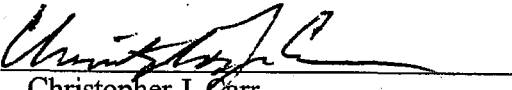
16 **IV. CONCLUSION**

17 For all the foregoing reasons, Palmaz respectfully requests that the State Water Resources  
18 Control Board grant a stay of the effect of the Technical Report Order. Palmaz requests that the  
19 stay remain in effect until at least ten days after formal resolution of this Petition.  
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1 Respectfully Submitted,

2  
3 Dated: May 7, 2009

EDGAR B. WASHBURN  
CHRISTOPHER J. CARR  
SHAYE DIVELEY  
MORRISON & FOERSTER LLP

4  
5  
6 By:   
7 Christopher J. Carr

8 Attorneys for Petitioners JULIO  
9 CESAR PALMAZ and AMALIA B.  
10 PALMAZ, TRUSTEE OF THE  
11 AMALIA B. PALMAZ LIVING  
12 TRUST  
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*Exhibit A*

*Exhibit A*



# California Regional Water Quality Control Board

## San Francisco Bay Region



Linda S. Adams  
Secretary for  
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.waterboards.ca.gov/sanfranciscobay>

Arnold Schwarzenegger  
Governor

**Certified mail – Return Receipt Requested**

Date: April 10, 2009  
File No. 2139.3137 (WBH/FH)  
CIWQS No. 657324

**RECEIVED**

**APR 15 2009**

Morrison & Foerster

Mr. Julio Cesar Palmaz and  
Mrs. Amalia B. Palmaz  
4031 Hagen Road  
Napa, CA 94558

**SUBJECT: REQUIREMENT FOR TECHNICAL INFORMATION, PALMAZ  
VINEYARD AND WINERY**

Dear Mr. and Mrs. Palmaz,

This letter serves as a formal requirement to provide the San Francisco Bay Regional Water Quality Control Board (Water Board) with technical information related to Palmaz Vineyard Winery construction activities and the corresponding disposal of cave spoils and filling of wetlands on the 1400 foot elevation vineyard area. You are hereby required to provide technical reports pursuant to California Water Code (CWC) § 13267 providing the information related to both the current use of the cave spoils on the 1400 foot elevation vineyard, and construction of the winery cave from which the cave spoils were excavated.

**No later than May 1, 2009**, you shall submit technical reports to the Water Board, acceptable to the Executive Officer, providing: (1) the total costs of building the Palmaz Vineyard Winery, including but not limited to, costs associated with the excavation of the cave, the construction of the Winery structure, the construction of the associated on-site wastewater treatment facility, and the disposal of cave spoils at various locations on-site and off-site, including trucking and grading costs; and (2) the name of the grape varietal(s) currently cultivated on your 1400 foot elevation vineyard area, including the current and projected yields of grapes harvested from the 1400 elevation vineyard area.

Please be aware that this requirement for submitting technical information constitutes a formal requirement for submittal of technical reports pursuant to CWC §13267 (a copy of the CWC § 13267 Fact Sheet is enclosed as Attachment A). While we expect your cooperation, failure to submit, late or inadequate submittal, or falsification of such technical report(s) constitutes a violation of the California Water Code and may result in the imposition of civil liability in accordance with CWC § 13268.

Mr. and Mrs. Palmaz

Page 2 of 4

If you have any questions please contact Fred Hetzel at (510) 622-2357, or by e-mail at [fhetzel@waterboards.ca.gov](mailto:fhetzel@waterboards.ca.gov).

Sincerely,

*Bruce Wolfe* acting for

Bruce Wolfe  
Executive Officer

encl. Attachment A - CWC § 13267 Fact Sheet

Cc: Mike Josselyn, WRA Environmental Consultants  
2169-G East Francisco Blvd., San Rafael, CA 94901

Christopher Carr, Morrison Foerster LLP  
425 Market Street, San Francisco, CA 94105-2482

Lt. Don Richardson, California Department of Fish and Game  
7329 Silverado Trail, Napa, CA 94599

Daryl Roberts, Napa County District Attorney's Office  
Carithers Building, 931 Parkway Mall, Napa, CA 94559

## Attachment A - CWC § 13267 Fact Sheet



Linda S. Adams  
Secretary for  
Environmental Protection

# California Regional Water Quality Control Board

## San Francisco Bay Region

1515 Clay Street, Suite 1400, Oakland, California 94612  
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Arnold Schwarzenegger  
Governor

### Fact Sheet – Requirements for Submitting Technical Reports Under Section 13267 of the California Water Code

#### What does it mean when the Regional Water Board requires a technical report?

Section 13267<sup>1</sup> of the California Water Code provides that "...the regional board may require that any person who has discharged, discharges, or who is suspected of having discharged or discharging, or who proposes to discharge waste...that could affect the quality of waters...shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

#### This requirement for a technical report seems to mean that I am guilty of something, or at least responsible for cleaning something up. What if that is not so?

The requirement for a technical report is a tool the Regional Water Board uses to investigate water quality issues or problems. The information provided can be used by the Regional Water Board to clarify whether a given party has responsibility.

#### Are there limits to what the Regional Water Board can ask for?

Yes. The information required must relate to an actual or suspected or proposed discharge of waste (including discharges of waste where the initial discharge occurred many years ago), and the burden of compliance must bear a reasonable relationship to the need for the report and the benefits obtained. The Regional Water Board is required to explain the reasons for its request.

#### What if I can provide the information, but not by the date specified?

A time extension may be given for good cause. Your request should be promptly submitted in writing, giving reasons.

#### Are there penalties if I don't comply?

Depending on the situation, the Regional Water Board can impose a fine of up to \$5,000 per day, and a court can impose fines of up to \$25,000 per day as well as criminal penalties. A person who submits false information or fails to comply with a requirement to submit a technical report may be found guilty of a misdemeanor. For some reports, submission of false information may be a felony.

#### Do I have to use a consultant or attorney to comply?

There is no legal requirement for this, but as a practical matter, in most cases the specialized nature of the information required makes use of a consultant and/or attorney advisable.

#### What if I disagree with the 13267 requirements and the Regional Water Board staff will not change the requirement and/or date to comply?

You may ask that the Regional Water Board reconsider the requirement, and/or submit a petition to the State Water Resources Control Board. See California Water Code sections 13320 and 13321 for details. A request for reconsideration to the Regional Water Board does not affect the 30-day deadline within which to file a petition to the State Water Resources Control Board.

#### If I have more questions, whom do I ask?

Requirements for technical reports include the name, telephone number, and email address of the Regional Water Board staff contact.

*Revised January 2008*

<sup>1</sup> All code sections referenced herein can be found by going to [www.leginfo.ca.gov](http://www.leginfo.ca.gov).

*Preserving, enhancing, and restoring the San Francisco Bay Area's waters for over 50 years*

*Recycled Paper*





*Exhibit B*

*Exhibit B*

MORRISON | FOERSTER

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SACRAMENTO, WALNUT CREEK  
TOKYO, LONDON, BEIJING,  
SHANGHAI, HONG KONG,  
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April 29, 2009

Writer's Direct Contact  
415.268.7246  
Telefacsimile: 415.276.7535  
CCarr@mofo.com

*Via Email and Regular Mail*

William B. Hurley  
Senior Water Resources Control Engineer  
Fred Hetzel  
San Francisco Bay Regional Water  
Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

**Re: Request for Reconsideration and Response to "Requirement for Technical Information, Palmaz Vineyard and Winery"**

Dear Messrs. Hurley and Hetzel:

This letter responds to the 13267 Order dated April 10, 2009 ("April 10 Order"), specifically seeking reconsideration of the Order.

**Objection to and Request for Reconsideration of April 10 Order**

The April 10 Order fails to satisfy the requirements of Water Code section 13267(b). It fails to provide the requisite "explanation with regard to the need for the reports." Cal. Water Code § 13267(b). The April 10 Order could not properly be claimed to be in implementation of Cleanup and Abatement Order R2-2007-0019 and, indeed, makes no reference to it. The April 10 Order also fails to "identify the evidence that supports requiring [the Palmazes] to provide the reports." Cal. Water Code § 13267(b). Moreover, the "burden, including costs, of the[] reports" fails to "bear a reasonable relationship to the need for [them] and the benefits to be obtained from [them]." *Id.*

Accordingly, the Palmazes respectfully request that the April 10 Order be revised to comply with the requirements of section 13267(b). The Palmazes further request that the April 10 Order be modified to eliminate the requirement to provide "the total costs of building the Palmaz Vineyard Winery, including but not limited to, costs associated with the excavation of the cave, the construction of the Winery structure, the construction of

William B. Hurley  
Fred Hetzel  
San Francisco Bay Regional Water Quality Control Board  
April 29, 2009  
Page 2

the associated on-site wastewater treatment facility, and the disposal of cave spoils at various locations on-site and off-site, including trucking and grading costs." This overbroad request for financial information concerning the winery is unnecessary and lacks any reasonable relationship to the need for such information and the benefits to be obtained from it, even if such need could be articulated and such potential benefits could be hypothesized. To that end, the Palmazes request that only the last item in that list be retained in the Order (viz., "the disposal of cave spoils at various locations on-site and off-site, including trucking and grading costs") and that it be expressly limited to the 1400 vineyard. This is the only information that could even theoretically be relevant to the investigation of the placement of fill in waters of the State on the 1400 vineyard and, thus, could properly be the subject of such an order.<sup>1</sup>

#### **Informational Response to April 10 Order**

Notwithstanding and without waiving their objections to the failure of the April 10 Order to comply with the requirements of section 13267(b), the Palmazes provide the following information on (1) the costs of disposal of the cave tailings on the 1400 vineyard and (2) the grapes currently grown on, and current and projected yields from, the 1400 vineyard. The Palmazes provide this information in a continuing demonstration of their good faith efforts to respond to the Regional Board's inquiries, and not in any recognition of the validity of the April 10 Order or that the information provided below is in any manner related to the ongoing investigation with respect to the 1400 vineyard.

#### **1. Costs of Cave Tailings Disposal on 1400 Vineyard**

As noted above, the April 10 Order improperly seeks "the total costs of building the Palmaz Vineyard Winery," a facility that is not subject to any ongoing Regional Board investigation. There is no rational need for this information. Presuming the Regional Board's intention was not simply to harass, but rather seek some information that may conceivably be related to the ongoing investigation concerning the 1400 vineyard, the Palmazes provide the information below regarding the costs of cave tailings disposal on the 1400 vineyard. Again, this is offered in good faith and for informational purposes only, and is not an admission of the legitimacy of the April 10 Order.

As set forth in Dr. Josselyn's letter to Ms. Whyte of April 6, 2009 (at page 2), "[t]he amount of fill placement in WRA 1 is 761 cubic yards and for WRA 2 it is 83 cubic

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<sup>1</sup> By limiting their request for reconsideration to that portion of the Order concerning costs, the Palmazes do not concede the propriety of, or waive their objection to, that part of the Order requesting information about grapes and yields on the 1400 vineyard. As stated, the Order in its entirety fails to comply with the requirements of section 13267 of the Water Code for all the reasons therein stated.

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yards." Thus, a total of 844 cubic yards of fill was placed in waters of the State on the 1400 vineyard. The loading of cave tailings onto dump trucks on the lower part of the property, their transportation to the 1400 vineyard, and their placement on the 1400 vineyard by a bulldozer is estimated to have cost an average of \$8.24 per cubic yard. For the 844 cubic yards of fill involved, this amounts to a cost of \$6,954.56.<sup>2</sup>

It is not a little ironic that removal of the fill from the property and its disposal off-site would have cost significantly less. The reduced cost would primarily have been due to the reduced transportation costs that would have involved in trucking the tailings to a site on the Napa Valley floor (in contrast to the difficult-to-reach 1400 vineyard). The Palmazes could have disposed of the tailings at a property located on South Jefferson Street at a cost of approximately \$5.31 per cubic yard (including a \$2 per cubic yard dumping fee that the landowner charged). For the 844 cubic yards of tailings involved, this would have cost \$4,481.64.

But even this alternative disposal cost likely far over-estimates what the cost of disposing the tailings off-site would have been. The more likely scenario would have been for someone needing fill to haul the tailings away at no charge to the Palmazes (other than perhaps the cost of the loader to place the tailings in dump trucks). Indeed, the Palmazes received a number of inquiries from people interested in trucking away the tailings.

## **2. Grapes and Yields on 1400 Vineyard**

The entire 1400 vineyard is planted to cabernet, and consists of six blocks.

The block on which WRA 1 is located is approximately 5 acres. In 2007, it yielded 0.66 tons/acre. In 2008, it yielded 1.43 tons/acre. The Palmazes expect that in 2009 and beyond it will yield approximately 2.0 tons/acre.

The block on which WRA 2 is located is approximately 2.2 acres. In 2007, it yielded 0.17 tons/acre. In 2008, it yielded 0.63 tons/acre. The Palmazes expect that in 2009 and beyond it will yield approximately 1.0 tons/acre.

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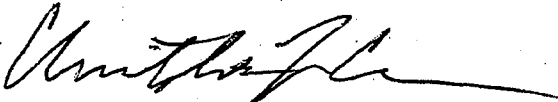
<sup>2</sup> As noted, this estimated cost is a conservative estimate that only includes the costs of loading, trucking, and dozing the tailings on the 1400 vineyard. There were additional costs involved in placing the tailings on-site, rather than off-site, such as erosion control measures, terracing, and the like that resulted in a cost of approximately \$96,000 per acre to develop vineyards from cave tailings.

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Please let me know at your earliest convenience and no later than May 6, 2009, whether this request for reconsideration is granted. If we do not hear from Regional Board staff by that date that the request has been granted, and receive by that date a letter reflecting that the April 10 Order has been revised as requested, we will have no choice but to file a petition with the State Board seeking its review, and immediate stay, of the April 10 Order.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher J. Carr", with a long horizontal flourish extending to the right.

Christopher J. Carr

# *Exhibit C*

*Exhibit C*

**MORRISON | FOERSTER**

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April 7, 2009

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***Via Email and Regular Mail***

William B. Hurley  
Senior Water Resources Control Engineer  
Fred Hetzel  
San Francisco Bay Regional Water  
Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

**Re: CAO No. R2-2007-0019: Palmaz Response to Letter of December 17, 2008**

Dear Messrs. Hurley and Hetzel:

This letter responds to the December 17, 2008, Letter of Ms. Whyte ("December 17 Letter") regarding the technical reports and workplan the Palmazes submitted in response to Cleanup and Abatement Order R2-2007-0019 ("CAO"). The December 17 Letter claims that those submittals fail to comply with the CAO in numerous respects. These alleged deficiencies are addressed below.

There are no material inadequacies in the technical reports. However, it bears mention at the outset that, even if there were, the Palmazes could not properly and lawfully be found to be in violation of the CAO from the compliance deadlines set forth in the August 13, 2008 extension letter to the present. The technical reports were required to be submitted by September 15, 2008; the corrective action work plan by October 15, 2008. But it was not until they received the letter dated December 17, 2008, that the Palmazes and their representatives were informed by the Regional Board of alleged deficiencies in the technical reports and work plan. The Palmazes cannot be charged for the three-month delay in review of the technical reports and the two-month delay in review of the work plan. Moreover, it would also be improper and unlawful for penalize the Palmazes for time taken to respond to the December 17 Letter, given it is based on requirements sought to be imposed for the first time in that letter.

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**A Disagreement Over the Extent of Waters of the State Cannot Be Morphed Into A Claim of Informational Inadequacy**

The December 17 Letter appears to take the position that the parties' different views concerning what features constitute "waters of the state" amounts to failure on the part of the Palmazes to provide information required by the CAO. This is unreasonable, improper and unlawful.

The CAO requires technical reports to characterize "waters of the State" affected by land-disturbing activities both prior to and after those activities. (CAO Provision B.1.) So, the CAO establishes two pre-conditions for a water feature to be characterized in a technical report: (1) it had to be a "water of the State" and (2) it had to be affected by land-disturbing activities. The CAO requires the technical reports to include:

- "descriptions of the conditions of all areas containing wetland habitat, surface water drainage features, springs or other waters of the State at the Site, as they existed prior to any grading, excavation, culverting, filling, or other construction-related activities, and land or water feature disturbances at the Site" (CAO Provision B.1.b.)
- "descriptions of any impacts to wetland areas, surface water drainages, springs or other waters of the State at the Site, associated with grading, excavation, culverting, filling, or other construction-related activities" (CAO Provision B.1.c.)

That the CAO requests characterization of "waters of the State" affected by land disturbing activities is confirmed by the section of the CAO requiring the submission of a Corrective Action Workplan. (CAO Provision B.2.) It requires a "workplan proposal for corrective actions" with respect to "wetlands and other waters of the State that have been impacted at the Site by grading, excavation, culverting, filling, other construction-related activities, and land or water feature disturbances." (CAO Provision B.2.a.) In addition, the requirement for a workplan to mitigate for temporal impacts specifies that the impacts to be mitigated are those to "waters of the State." (CAO Provision B.2.c.)

The August 13, 2008, Letter signed by Ms. Whyte ("Extension Letter") does not alter the requirements of the CAO for characterization of site conditions in technical reports (nor could it lawfully do so). That letter merely extended deadlines for the submittal of technical reports required by the CAO; it did not change the required contents of those reports.

The December 17 Letter claims that the before and after site condition technical reports are inadequate in two main, and related, respects: (1) they fail to adequately describe historic



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drainage on the 1400 vineyard<sup>1</sup> and (2) they underestimate the extent of wetlands and other waters of the State on the 1400 vineyard.<sup>2</sup> These claims are incorrect and improper for several reasons.

First, as noted above, these claims of inadequacy mischaracterize the requirements of the CAO. The CAO requires descriptions of only water features that are waters of the State that were affected by land-disturbing activities. The CAO does not require any description of water features that are *not* waters of the State and were *not* affected by land-disturbing activities. So, based on the CAO as written (and the legal limits of the Regional Board's authority with respect to CAOs and technical reports), there is no category of water features, separate from waters of the State, that the CAO required be described.

Second, the claims of inadequacy, according to the logic of the letter itself, are not separate claims, as the letter appears to take the position that water features and waters of the State are co-extensive on the 1400 vineyard.

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<sup>1</sup> The letter claims that the technical report required by CAO Provision B.1.b. does "not adequately describe the historical natural drainage on the property prior to any fill, culverting or drainage diversion activities." December 17, 2008, Letter at 2. With respect to the technical report required by CAO Provision B.1.c., the letter states: "You have also not adequately described the impacts from the changes in the hydrologic regime, resulting from culverting of the natural seasonal drainage to the remaining wetlands and other waters of the State." *Id.* at 3. In claiming that the workplan is inadequate, the letter states that the "restoration plan should incorporate re-establishment of the historical drainage pathways and hydrology, including the channels and other flows sustaining the wetlands." *Id.* at 4; *see also id.* at 3 (proposed restoration plan "does not propose restoration of the historical hydrology of the Site that sustained the wetlands"; proposed restoration plan "does not incorporate restoration of the natural seasonal drainage to sustain the restored wetlands and other waters of the state").

<sup>2</sup> The letter claims that the technical report required by CAO Provision B.1.b. is inadequate because "the entire extent of filled wetlands and other waters of the State [are not] clearly delineated." December 17, 2008, Letter at 2. In describing claimed inadequacies of the technical report required by CAO Provision B.1.c., the letter states: "As discussed under CAO Provision B.1.b., you have underestimated the extent of wetlands and other waters of the State present on the site prior to grading and filling activities." *Id.* at 3. In describing claimed inadequacies of the workplan, the letter states: "As discussed for CAO Provision B.1.b., you have underestimated the extent of wetlands habitat on the Site." *Id.*

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Third, as explained in the enclosed letter from Dr. Michael Josselyn, the technical reports and workplan described all waters of the State that were affected by land-disturbing activities based on Dr. Josselyn's well-supported estimate of wetland acreage prior to such activities. Dr. Josselyn's analysis as to the extent of waters of the State on the site has subsequently been independently peer-reviewed by Dr. Laurence Stromberg. Dr. Stromberg reached the conclusion that Dr. Josselyn's analysis is more accurate than the WESCO Report relied upon by the CAO and the subsequent letters. A copy of Dr. Stromberg's findings is enclosed.

#### **Other Claimed Deficiencies**

Other claimed deficiencies in the technical reports and workplan are addressed for each provision of the CAO, below.

**CAO Provision B.1.a.** The December 17 Letter claims that technical report characterizing the nature and extent of land-disturbing activities is "deficient in describing the extent and depth of fill for both the lower and upper properties." December 17, 2008, Letter at 2.

More particularly, the letter complains that the Palmazes "have not provided site-specific as-built construction drawings that delineate the extent and depth of fill on the lower property." December 17, 2008, Letter at 2. The CAO required a technical report be prepared that characterized the nature and extent of the grading, excavation, filling, culverting or other construction activities and included, among other items, "as-built engineering plans." (CAO Provision B.1.a.) The Palmazes went beyond that requirement to provide detailed as-built construction drawings that had been previously prepared and delineated the extent and depth of fill on the upper property. However, there are no similar as-built drawings for the lower property. The Regional Board cannot reasonably require the Palmazes to prepare as-built construction drawings for work done a decade ago. It would be unreasonable to generate such drawings now in light of great costs and time involved, particularly where they would not serve an meaningful purpose as the proposed engineering plans provided adequately depict conditions on the lower property.

The letter also complains about the as-built construction drawings for the upper property: "the reported depth of fill (drawing V-7) does not match the extent of fill observed by Water Board staff at all locations on the Site, nor do the elevations depicted in the cross-sections match the elevation in the elevation contour figure (drawing V-3)." December 17, 2008, Letter at 2. As noted above, these as-built drawings were not prepared in response to the CAO and thus there may be differing interpretations of the cross-sections. These differences are addressed and clarifying information provided in the enclosed letter from Dr. Josselyn.

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**CAO Provision B.1.b.** The claim that the technical report for prior site conditions is inadequate has already been addressed, above, in the explanation of how the December 17 Letter confuses and conflates a disagreement over the extent of waters of the state impacted with a claim that the information provided was inadequate.

**CAO Provision B.1.c.** The claim that the technical report for site conditions after land-disturbing activities is inadequate has been addressed, in part, above, in the explanation of how the December 17 Letter confuses and conflates a disagreement over the extent of waters of the state impacted with a claim that the information provided was inadequate.

However, the December 17 Letter further claims that the technical report has “not adequately described the impacts from the change in the hydrologic regime, resulting from culverting of the natural seasonal drainage to the remaining wetlands and other waters of the State, *as we required in the revised CAO dated August 13, 2008.*” December 17, 2008, Letter at 3 (emphasis added). The emphasized language is an admission by the Regional Board that the CAO did not, and does not, require submission of the information the December 17 Letter claims is lacking. As explained above, the August 13 Extension Letter did not (and could not lawfully) change the substantive requirements of the CAO; it merely extended the compliance deadlines. All the CAO requires is a technical report characterizing present site conditions that includes descriptions of impacts associated with, among other things, culverting activities. (CAO Provision B.1.c.) The August 13 Extension Letter merely restates this requirement and does not, as apparently claimed (for the first time) by the December 17, 2008 Letter, impose any new requirements. As explained in the accompanying letter from Dr. Josselyn, the Palmazes have complied with this requirement of the CAO.

The December 17 Letter also complains that the technical report has “not adequately described the impacts of the irrigation water draining into the remaining wetlands and other waters of the State, including impacts to Hagen creek, resulting from increased dry season flows and the potential for discharge of applied agricultural chemicals and agricultural runoff.” December 17, 2008, Letter at 3. Again, this was not required in the CAO and the December 17 Letter cites no grounds for imposing such additional requirements on the Palmazes. (CAO Provision B.1.c.) Even if it was required, irrigation water does not drain into wetlands or other waters of the State on the property and, thus, there is no need to describe any impacts of such non-existent drainage; i.e., there is no drainage to describe. This is further explained in Dr. Josselyn’s enclosed letter.

**CAO Provision B.2.a.** The claim that the workplan is inadequate has been addressed, in part, above, in the explanation of how the December 17 Letter confuses and conflates a

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disagreement over the extent of waters of the state impacted with a claim that the information provided was inadequate.

With respect to the claim that historical drainage pathways and hydrology need to be restored, the work plan meets the requirements of the CAO. The runoff that historically was conveyed over land as sheet flow is currently contained within two culverts that discharge into two wetlands. The work plan proposes to remove these culverts from the restored wetlands, but retain them under the vineyard to collect and direct surface water that runs off the hills above. Best management practices to remove any sediment, nutrients and other substances from the flow coming from the vineyard before it enters the restored wetlands. A reference wetland will be used to monitor hydrology to compare to the restored wetlands and make necessary adjustments if appropriate. Dr. Josselyn's letter provides additional detail on this portion of the work plan.

The December 17 Letter also complains that the vegetation plan is inadequate in terms of being inconsistent with historical vegetation on the site as identified in the 1992 WESCO Report. Dr. Stromberg's letter explains why this claim is simply wrong. Nonetheless, the proposed work plan's list of wetlands species was based on establishing dominant species to revegetate the restored wetlands. The work plan list includes one of the dominant species identified in the WESCO Report; it will be amended to include the other two dominant species in the report. The remainder of the species identified by WESCO are established by seed sources. As the WESCO Report notes wetlands species in the area are "highly variable" and "each site possesses its own character," it is not possible to predict the precise and correct mix of species that might establish in a restored wetland. As explained in Dr. Josselyn's letter, the vegetation mix will be monitored and modified as appropriate.

Please let me know if you have any questions or if I may be any other assistance. I look forward to resolving these and all other issues associated with the CAO in a timely and mutually agreeable manner.

Sincerely,



Christopher J. Carr

Enclosures



April 6, 2008

Dyan Whyte, Assistant Executive Officer  
California Regional Water Quality Control Board  
1515 Clay Street Suite 1400  
Oakland, CA 94612

RE: CLEAN UP AND ABATEMENT ORDER: R2-2007-0019

Dear Ms. Whyte:

The purpose of this letter is to provide our technical response to the comments of the Regional Board staff, set forth in the letter of December 17, 2008, on the technical reports (including Workplans) that were submitted by WRA on behalf of the Palmaz Vineyard and Winery pursuant to the above-referenced CAO.

CAO Provision B.1.a

1. Site specific as-built drawings for the lower property that delineate the extent and depth of the fill on the lower property were not provided.

No as-built drawings exist for the lower property. Construction drawings for portions of the lower property where cave tailings were placed were provided to the Board on June 28, 2007 as included in the report prepared by Wagner and Bonsignore, Consulting Engineers. These areas included areas within the lower property identified as the "North Area", "Winery Access Road", and "South Area" and comprising approximately 5 acres. Drawings providing the proposed contours and estimated fill amounts were provided in this report and were documented in the Technical Reports submitted in August 2007 and September 2008.

No cave tailings were placed on the portion of the lower property south of Hagen Creek (referenced as the 200 vineyard in the Technical Report). Fill was placed for the retaining dam in Sediment Basin One as described on Page 17 of the September 2008 report and as documented in the Bartelt drawings attached to the Technical Report. Based on an analysis of historic aerial photographs, no "waters of the State" were filled within the 200 vineyard nor within any of the areas where cave tailings were placed.

2. The site specific as-builts for the upper property are incorrect.

The differing interpretations of the cross-sections are acknowledged. The direction in which the cross-sections are to be read is not clear on the drawings. Because the cross-sections were not taken to specifically address fill within the subsequently identified wetlands, WRA acquired the AutoCAD drawings for the pre and post-placement contours. Using this information and the presumed presence of wetlands prior to fill placement, WRA is submitting additional clarifying

information to the Board in the attached Figures 1 and 2. This information is the most accurate available since it is based on both pre- and post-placement elevational surveys. The amount of fill placement in WRA 1 is 761 cubic yards and for WRA 2 it is 83 cubic yards based on these drawings. The average depth of fill in WRA 1 is 2.6 ft with a range of 2 to 6 feet and in WRA 2 is 1.2 feet with a range of 0.5 to 3.5 feet.

CAO Provision B.1.b.

1. The Technical Report does not adequately describe the historical drainage [in the 1400 vineyard].

There is no evidence or documentation of historical drainages on the 1400 vineyard. While sheet flow did occur over this area that has been collected into two subdrains, no drainage features have been described for this area. None were detected, mapped, or described in the WESCO report nor were any observed in various aerial photographs reviewed by WRA for the technical reports. The WESCO report (Figure 3) does show intermittent streams elsewhere in their study area to the north and east of the 1400 vineyard, but not within the vineyard nor upstream of the identified wetlands.

2. The Technical Report underestimates the extent of filled wetlands and other waters of the State [in the 1400 vineyard].

The Technical Report documented its findings that prior to the placement of cave tailings in the 1400 vineyard, a total of 0.57 acres of wetlands were present. This determination was based on (1) the scaled drawings contained in the WESCO report (dated September 23, 1992) and as contained on Figure 3 of that report; (2) the interpretation of aerial photographs taken in 1991 and 2000 (both prior to fill placement); and (3) an electronic spectral recognition scan of a 1999 infrared aerial photograph acquired by the Board. All three methods provide approximately the same result. The Board is relying on two pieces of information and one hypothesis for its determination that 2.2 acres of wetlands existed within the footprint of the 1400 vineyard. The first piece of information is Table 2 of the WESCO report that lists the acreages of wetland C as 0.978 acres and wetland D as 1.200 acres. The table however has a caveat on it that the "areal measurements for potential jurisdictional areas on the Buehler, Bell and Lair properties are estimates only and will be revised following field verification with large scale maps to be provided to WESCO". As shown on their Figure 2, the 1400 vineyard is located in the area referred to as the Buehler property and therefore is subject to the caveat provided with the Table. Furthermore, the transmittal letter provided with the report states that "vegetation mapping for the Lair, Bell, Bryant and Buehler properties has not been completed, therefore acreages for each of the vegetation types are not included in the report". Subsequently, when the detailed studies were completed for the Buehler property, for some unexplained reason, the area where the 1400 vineyard is today was not included (see Plate 2-as appended to the WESCO report). Therefore, no further detailed studies are available for the 1400 vineyard to confirm the acreage estimate given in Table 2.

The ONLY data available is the original map contained in the WESCO report—Figure 3. As WRA has shown in its analysis, when using this scaled map, the acreages obtained were similar to those determined in the Technical Reports. Even a casual visual examination confirms that neither wetland C nor D could be as large as 1 acre. The only wetland of 1 acre shown on Figure 3 is "II" which is in the southeast corner of the map. The size of this wetland is significantly larger than the polygons shown for wetland C or D.

The second piece of information used by the Board is a 1999 infrared aerial photograph that was also supplied to WRA for further investigation. The photograph was taken in the fall so that depiction of seasonal wetlands is not ideal; however, WRA did use a spectral imaging program to detect signatures that could be used to determine the presence of wetland areas and found that it was slightly less than that estimated in the technical reports.

Finally, the Board hypothesizes that the wetlands on the Site "are located in a uniform elevational range between 1400 and 1410 feet" and that "this elevation range consists of a large flat area in an otherwise sloping environment and extends over a much larger area than your estimate of wetlands". This argument fails to take into account the shallow nature of the soils (bedrock within 6 inches) in this location and that the potential for holding water in these soils is very low. However, using this hypothesis, WRA examined the WESCO report and a similar area to the north of the 1400 vineyard that ranges in elevation between 1410 and 1420 feet. Within an area of similar size to the 1400 vineyard, three wetlands were found by WESCO referenced as R, S, and T on their Figure 3. According to the Table 2 of the WESCO report, the total acreage of these wetlands is 0.09 acres; a number which is much smaller than the Board's contention could have occurred in the similar flat area of the 1400 vineyard.

CAO Provision B.1.c.

1. The Technical Report does not adequately describe the impacts from change in the hydrologic regime.

The Technical Report describes the piping system that was installed within the vineyards and has provided as-built diagrams for these drainage systems. As noted in the Technical Report, the drainage systems discharge to the remaining portions of the two wetlands that were filled. Therefore, surface flow from above the 1400 Vineyard should be unaffected. Furthermore, the Technical Report documents the placement of an underground pipe within Wetland 2 which has relocated the discharge downstream of the unfilled portion of this wetland. The effect of this pipe is to eliminate surface water runoff to Wetland 2 and cause it to become drier than prior to the fill placement. The restoration work plan calls for continued direction of surface flow to the restored wetlands and removal of the pipe beneath Wetland 2.

2. The Technical Report does not adequately describe the impacts of irrigation water draining into wetlands and other waters of the State.

Irrigation water does not drain into wetlands or other waters of the State. The irrigation system is sensor-based such that irrigation water is only applied as needed by the vines themselves. No overhead spray or flood irrigation is used in the vineyard. Irrigation is not used in the winter rainy season.

CAO Provision B.1.d.

No comments.

CAO Provision B.2.a.

1. The Workplan proposal to restore wetlands and other waters of the State underestimate their extent.

This comment is based on the disagreement over the extent of wetlands and other waters of the State filled as a result of the placement of cave tailings in the 1400 vineyard. The restoration plan provides for removal of all fill from the affected waters of the State (including wetlands) and the restoration of hydrology through the removal of the pipe beneath Wetland 2.

2. The Workplan proposal does not provide for restoration of the historical hydrology and the natural seasonal drainage.

As noted in the Workplan, the runoff that formerly was conveyed over the land surface as sheet flow is now contained within two culverts which discharge to the two wetlands identified by WESCO and WRA. These culverts will be removed from within the restored wetlands, but will remain beneath the vineyard to collect and direct the surface water that runs off the mountain from the north and west of the 1400 vineyard. The wetlands have very shallow soils due to the underlying bedrock such that precipitation and the continuing drainage to restored wetlands will be sufficient to provide wetland hydrology that will saturate the soils for at least 3 weeks. The Workplan calls for use of a reference wetland (one of the wetlands identified by WESCO north of the Palmaz Vineyards such as R, S or T) to monitor hydrology as a comparison to the restored wetlands.

The irrigation system that is used at the 1400 vineyard is a drip irrigation system and is controlled by sensors such that irrigation water is only added in sufficient quantities to support the growth of the vines. The irrigation system does not result in overwatering or drainage of excess water. In addition, fertilizer is added as part of the irrigation system so that it is also controlled. However, the Workplan proposal to restore wetlands calls for a small forebay at the head of each of the restored wetlands. The forebays will be designed to allow water to pond and will be vegetated with wetland plants so that any sediment, nutrients, and other substances will be removed prior to entering the restored wetlands.

3. The Workplan proposal's revegetation plan is inconsistent with the historical vegetation on the site.

WRA developed its list of wetland species to revegetate the restored wetlands based on establishing dominant species, including *Juncus*, one of the dominants observed by WESCO. The other two dominant wetland species that were noted by WESCO in its description of the seasonal wetlands were *Carex bolanderi* and *Carex feta*. WRA will add these species to the plant palette. The remainder of the species listed by WESCO include species that establish themselves within wetlands via seed sources. Because WESCO states that "this community is highly variable in species composition; each site possesses its own character", it is not possible to predict the correct mix of species that might colonize the restored wetlands proposed. The performance criteria will include a comparison to reference wetlands and the composition of the restored wetlands will be compared to the reference wetlands as part of the performance standards.



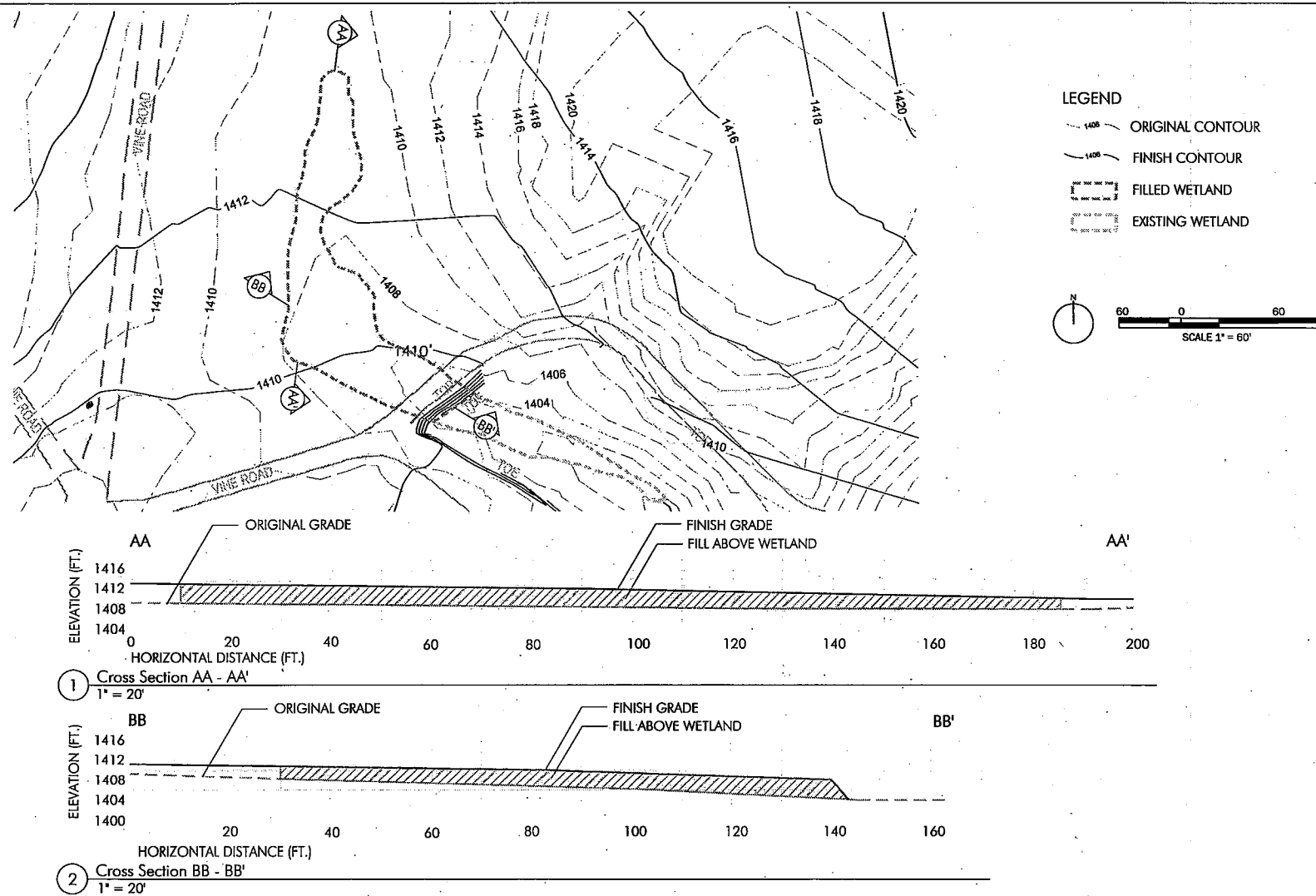
Our firm prepared the technical reports (including Workplans) requested in the CAO using all the information available to us and as supplied by the Palmaz Vineyard and Winery and the Board staff. We believe that this information is accurate and complete and have provided a list of the technical information used in preparation of the technical reports. Should the Board have any other information that they believe to be relevant, we request that they provide that to the Palmaz Vineyard and Winery.

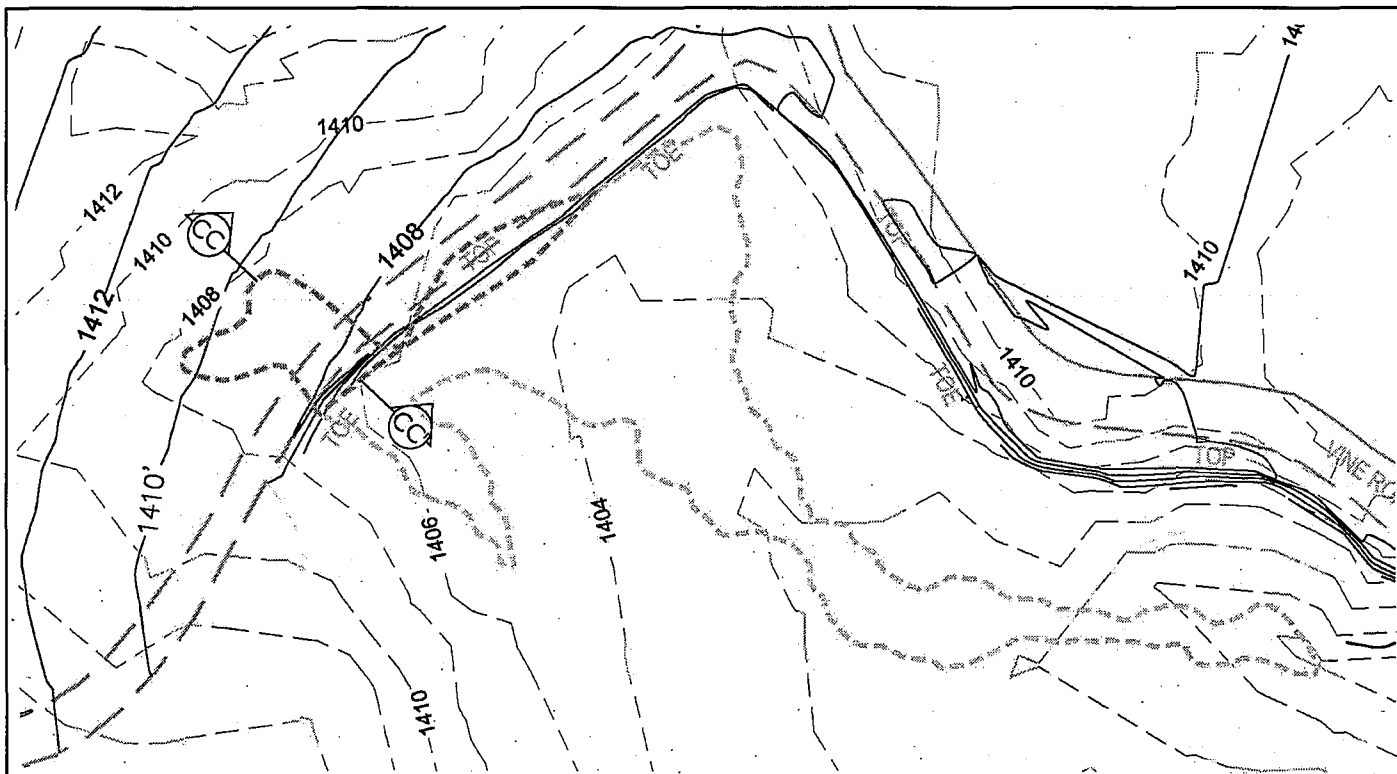
Sincerely yours,

A handwritten signature in black ink, appearing to read 'Michael Josselyn', with a long horizontal line extending to the right.

Michael Josselyn, PhD  
Certified Professional Wetland Scientist

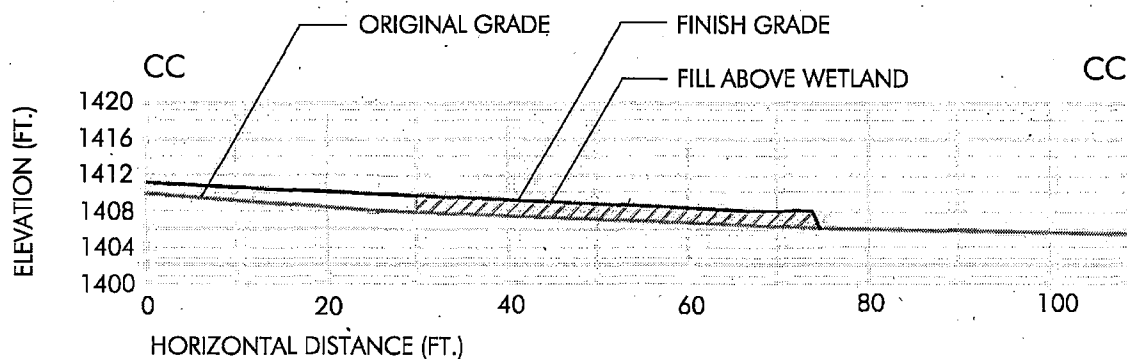
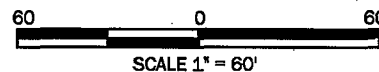
cc. Amalia and Julio Palmaz  
Chris Carr, Morrison and Foerster  
Fred Hetzel, RWQCB





# LEGEND

- 1408 — ORIGINAL CONTOUR
- 1408 — FINISH CONTOUR
- FILLED WETLAND
- EXISTING WETLAND



1 Cross Section CC - CC'  
1" = 20'



Palmaz Vineyard  
4029 Hagen Road  
Napa, CA 94558

Figure 2.  
Plan and Cross Sections of  
Wetland WRA-2 Before and After  
Fill Placement  
Date: January 2009

**Laurence P. Stromberg, Ph. D.**

Wetlands Consultant

59 Jewell Street, San Rafael, CA 94901

Tel. & Fax: (415) 721-0700

April 6, 2009

Mr. Chris Carr, Esq.  
Morrison & Foerster LLP  
425 Market Street  
San Francisco, CA 94105-2482

**SUBJECT: REVIEW OF CLEANUP AND ABATEMENT ORDER R2-2007-0019  
AND ASSESSMENT OF REPORTS BY WESCO AND WRA PRESENTING  
ASSESSMENTS OF PRIOR AND CURRENT RESOURCE CONDITIONS**

Dear Chris:

Thank you for the opportunity to assist you and your client, Palmaz Vineyards and Winery, respond to the Cleanup and Abatement Order (CAO). I understand my objectives to be restricted to (1) a review of the reports upon which the California Regional Water Quality Control Board (RWQCB) relied in assessing the extent of the impacts of the discharge of cave spoils into wetlands and other waters of the State of California resulting from vineyard installation activities on the "1400" vineyard at Palmaz Vineyard and Winery in Napa County, California, and (2) a review of and assessment of statements and conclusions made by the RWQCB in its Cleanup and Abatement Order and its staff's statements that the reports by WRA are deficient.

Upon your request I reviewed the following letters, reports, and other documents:

1. California RWQCB Cleanup and Abatement Order R2-2007-0019, Palmaz Vineyard and Winery, Napa County, dated March 21, 2007.
2. Revised Draft Wild Horse Ranch Biological Resources Survey, prepared by WESCO and submitted to SWA Group on September 23, 1992 (without plates in hard-copy reports).
3. Revised Technical Report: In Fulfillment of Certain Provisions of the California RWQCB Cleanup and Abatement Order R2-2007-0019, prepared for Palmaz Vineyard and Winery, Napa California, by WRA, and dated September 10, 2008.
4. California RWQCB Letter to Mr. Julio Cesar Palmaz and Mrs. Amalia B. Palmaz, dated January 30, 2008. Subject: Cleanup and Abatement Order R2-2007-0019, Palmaz Vineyard and Winery, Napa County.
5. California RWQCB Letter to Mr. Julio Cesar Palmaz and Mrs. Amalia B. Palmaz, dated August 13, 2008. Subject: Cleanup and Abatement Order R2-2007-0019, Comments on Submittals, Unresolved Compliance Requirements and Revised Deadlines, Palmaz Vineyard

and Winery, Napa County.

6. California RWQCB Letter to Trustee of the Amalia B. Palmaz Trust, dated December 17, 2008. Subject: Notice of Violation for Inadequate and Unacceptable Responses to Cleanup and Abatement Order R2-2007-0019, Palmaz Vineyard and Winery, Napa County.

On February 4 and 25, 2009, I also visited the site to make field observations. In addition, I made office measurements of the mapped areas of the wetlands in question.

I have restricted my focus to be the prior and current conditions and the impacts of the activities involved in placing the cave spoils on the 1400 vineyard.

### **CLEANUP AND ABATEMENT ORDER**

In Finding 4 of the CAO, the RWQCB claims that cave spoils were placed into approximately two acres of wetlands and that one or more tributaries to Hagen Creek were culverted and filled. Finding 6 identifies two wetlands, Wetlands C and D identified by WESCO, as having been filled and uses areas provided by WESCO to quantify impacts.

### **DOCUMENT REVIEW**

Figure 3 in WESCO's report maps wetlands and other waters on 620 acres of the Wild Horse Valley Ranch, which includes the 1400 Vineyard on the Palmaz Vineyard and Winery Site. WESCO mapped the wetlands and other waters on a non-rectified 200-scale (1 inch on the photo representing 200 feet on the ground) and transferred the results to five 100-scale topographic maps. In conducting a pre-jurisdictional determination, WESCO collected data at 290 sample sites paired to "bracket" the boundaries of wetlands and possibly non-wetland features on the 620-acre area. Table 3 in WESCO's report contains the areas of the individual wetlands and drainage features mapped.

Wetlands C and D, partially within the 1400 Vineyard, are mapped in Figure 3. Table 3 presents their areas as 0.978 and 1.200 acres, respectively. "By scanning the 7.5 minute USGS map for this area and then georeferencing the scan to the georeferenced digital versions of the basemaps used by WESCO," WRA (page 7 of its September 10, 2008, Revised Technical Report) produced estimates of 0.26 acres and 0.37 acres for Wetlands C and D, but did not explicitly state that the differences resulted from a scale-related error by WESCO. Analyzing stereo pairs of 1991 and 2000 aerial photographs, WRA produced estimates of 0.228 acres and 0.342 acres for WRA wetlands 1 and 2, alternatives to Wetlands C and D. Analyzing a color infrared aerial photograph supplied by RWQCB with electronic spectral recognition program (Ecognition) WRA mapped a second pair of alternative wetland polygons with areas at 0.17 acres and 0.30 acres.

Using simple area-measuring software in the office, I estimated the areas of WESCO Wetlands C and D at 0.26 and 0.38 acres, respectively. During my field visit to the Site I compared WESCO's wetland polygons and the two sets of polygons mapped by WRA with conditions I observed on the ground. Although only parts of Wetlands C and D remain intact, I was able to compare those parts with the conditions I observed on the ground, taking into account the impact of vineyard installation and drainage modification on the vegetational conditions of those remnants.

Both WESCO and WRA show drainages terminating at Wetlands C and D (or WRA 1 and 2);

neither mapped a drainage upslope of Wetland C or D. I reviewed the 1998 color-infrared photograph provided by the RWQCB and, on February 25, 2009, visited the areas upslope of the vineyards west of Wetlands C and D to assess the characteristics of the drainages. The intact portions of the two wetlands occupy similar landscape positions that slope relatively gently compared with steeply sloping, rocky terrain to the west. A very narrow, bedrock-controlled drainage is present in the canyon above the vineyard west of Wetland D. No such drainage likely persisted across the relatively flat area between the hills and Wetland D. Likewise, no such drainage conveyed water to Wetland C. Both the U.S.G.S. topographic map and the 1998 aerial photograph show that Wetland C is at the base of a ridge. None was mapped by WESCO.

I have not reviewed the field data sheets produced by WESCO and do not know that WESCO paired sample points at the boundaries of Wetlands C and D. Furthermore, I do not know whether or not the Corps of Engineers would have verified the boundaries WESCO mapped. I also accept, for purposes of my review, that wetlands were present at the two locations.

### **PRIOR CONDITIONS**

Based on my review of the maps and my field observations of the remnant areas of Wetlands C and D, I believe that WRA's wetland map is more accurate than WESCO's wetland map and that the areas of the wetlands originally present in those locations have been more accurately estimated by WRA. My conclusions follow from the following:

1. WESCO mapped wetlands on 200-scale photographic base(s), transferring them thereafter to enlargements. In the transfer process, some loss of accuracy in shape and landscape position *may* have occurred. Nevertheless, on the 1,000-scale map, both wetlands are mapped as oval features with relatively regular boundaries that, based on my field observations, do not fit landscape conditions and the local microtopographic variation that affect boundary position and regularity.
2. The drainage WESCO mapped below Wetland D does not align with the base map contours and is shifted from the flow-line to the adjacent south-facing slope. Because Wetland D terminates at the upper end of the drainage, it may not be mapped in its true plan position.
3. WRA's Wetlands 1 and 2 appear to be well fitted to the landscape and possess irregular boundaries that reflect local microtopographical variation. The wetland polygons produced using Ecognition fit particularly well with the vegetation (shrubby vegetation between the limbs), minor microtopographic variation, adjacent slopes, rock outcrops, and slightly higher ground both within and at the margins of the wetlands. Using Figure 5 from WRA's Revised Technical Report, I measured the areas of WESCO's Wetlands C and D and those WRA produced using Ecognition. My areas are slightly smaller (but within 0.01 acre) than WRA's estimates of WESCO's Wetlands C and D.
4. The drainages mapped by WESCO are very straight, linear features with none of the sinuosity consistent with landscape conditions. Those mapped by WRA reflect the sinuous centerline a drainage that courses through such irregular, rocky terrain below the wetlands would be expected to possess.

The RWQCB has accepted the locations and shapes of WESCO's Wetlands C and D and relied upon

their estimated areas. Accepting the information provided by well-respected consulting firms and individuals is reasonable, efficient, and standard agency practice but in letters following submittals of WRA's reports, the RWQCB staff continued to accept WESCO's pre-disturbance work, rejecting WRA's wetland areas as too low and its work as deficient without investigating the possibility that scale-related inaccuracies in WESCO's work produced individual wetland areas that are too large.

WRA properly used WESCO's map and indicated scale in arriving at its estimated areas and clearly established good reason for the RWQCB staff to review its initial assessment of not only the Site conditions prior to the grading and filling activities but of the magnitude and extent of the associated impacts. However, the RWQCB staff persists in relying upon WESCO's area estimates. In its letter of January 30, 2008, it states that it recognizes "that the WESCO Report identifies the aerial measurements of Wetlands C and D as estimates pending field verification with larger scale maps..." No verification occurred but measurement using the correct scale does not require field verification. Given that WESCO's and WRA's alternative wetland polygons are so similar in size, it seems obvious that use of the wrong scale explains why the estimated areas differ so vastly.

Although I did not see Wetlands C and D before they were partially filled and have not had an opportunity to review WESCO's original (field) maps, I believe that WRA's estimated wetland areas are more accurate because the shapes are more accurately configured to reflect ground conditions and that their area estimates are correct.

## **ASSESSMENT OF IMPACTS**

WESCO has done no post-disturbance work on the Site and no comparison between WESCO and WRA impact assessments is possible. However, in three letters dated January 30, 2008, August 13, 2008, and December 17, 2008, the RWQCB staff repeatedly bases its determination of the extent of impacts on WESCO's area estimates, insisting that WRA has underestimated them. Problems arising from the failure to resolve the issue regarding scale in accepting the area estimates made by WESCO carry over into the RWQCB staff's determination that the client has not satisfied the requirements of CAO provision B.1.c.

The RWQCB staff states in its letter of August 13, 2008, that it has photographs that "support the wetland delineation acreage estimates provided by WESCO." The photographs may provide a satisfactory basis for determining that wetlands were present but WRA mapped wetlands with boundaries that more accurately reflect ground conditions. WRA did not rely solely on its own mapping to make the point that the areas of WESCO's mapped wetlands and, therefore, the impacts were smaller. Whether or not the wetlands mapped by WESCO are in precisely accurate plan positions is unimportant but their area estimates are and until the matter of scale is resolved, it appears that the RWQCB staff will not accept that the impacts of the work were smaller. In its August 13, 2008, letter the RWQCB staff questions the choice of photographs by WRA in its analysis. I believe that the issue of scale makes the choice of photograph less significant.

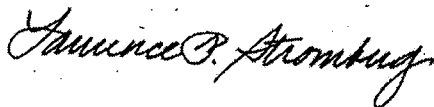
I believe that the RWQCB staff may have characterized the impacts of the cave spoil disposal in somewhat overstated terms, again relying on WESCO's 1992 report. In some cases, the overstatement seems to be without support or sufficiently site-specific data from WESCO's report. RWQCB staff's August 13, 2008, letter states that Wetlands C and D are areas of "high biological significance" and "botanically very rich." RWQCB staff's December 17, 2008, letter states that the WESCO report details "the specific wetland species present" in the two wetlands.

The WESCO report does contain an exhaustive list of plant species in an appendix but, except for Wetland Q, to which WESCO makes specific reference because of uncertainty about the wetland's jurisdictional status, the report contains neither wetland-specific floristic nor vegetational data for Wetlands C and D. The report description of seasonal wetland habitat mentions none of the 30 seasonal wetlands individually and the species list was tallied for the entire array of habitats on the Site. The WESCO report mentions their collective regional importance but makes no representations as to the biological significance or botanical richness of Wetland C or D or any other wetland.

WESCO's report may provide part of the "groundwork" for an overstatement of the impacts by the RWQCB staff in that it concludes that the loss of any of the wetlands on the Site would be significant. I do not accept that conclusion because a large number of the wetlands in the Wild Horse Ranch Site studied by WESCO are very small (many under 1,000 square feet) and I do not think that the loss of one of the smaller wetlands would stand a common-sense test of significance. The presence of special-status plant species can be considered as basis for assigning significance to individual wetlands and their loss as a result of project impacts. Dwarf downingia (*Downingia humilis*) and Lobb's aquatic buttercup (*Ranunculus lobbii*) are two such species, both identified as occurring in vernal pools on the Wild Horse Valley Ranch and, in the case of dwarf downingia, around the drying edges of Mitten Lake.<sup>1</sup> Neither Wetland C or D is a vernal pool and, at least in the case of Wetland D, which I inspected more closely than Wetland C, the habitat is not depressional and the total vegetation cover approaches 100 percent. Neither dwarf downingia nor Lobb's aquatic buttercup occurs in this type of habitat. I have not reviewed WESCO's Plate 2, but based on my field observations I believe that the likelihood that either species occurs in Wetland C or D is extremely low. Another special-status species, Gairdner's yampah (*Perideridia gairdneri*) does, however, occur in habitat of the type at the margins of Wetland D but I have not surveyed the wetland perimeter. If Gairdner's yampah was not observed by WESCO in Wetland C or D, then the presence of special-status plant species could not be the basis for assigning particular significance to these two wetlands. Finally, WESCO conducted surveys for aquatic invertebrates and found no species of fairy shrimp in any wetlands on the Site.

I am available to provide additional assistance upon your request. Please contact me with questions.

Sincerely,



Laurence P. Stromberg, Ph.D.  
Wetlands Consultant

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<sup>1</sup>The report states that both species could be reestablished in created habitat although it offers a disclaimer for the downingia that several years may be required to establish adequate habitat conditions. My own professional experience in vernal pool creation and restoration indicates that dwarf downingia and Lobb's aquatic buttercup can become established immediately (and persist) in wetland habitat with appropriate soil and hydrologic conditions as long as the habitat is inoculated with the species.



CERTIFICATE OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on May 7, 2009, I served a copy of:

PETITION FOR REVIEW AND REQUEST FOR HEARING;  
REQUEST FOR IMMEDIATE STAY

☒ BY U.S. MAIL by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482 in accordance with Morrison & Foerster LLP's ordinary business practices. I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited with the United States Postal Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

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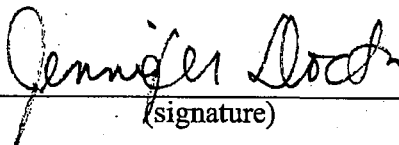
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9 Lieutenant Don Richardson  
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15 drichardson@dfg.ca.gov

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13 I declare under penalty of perjury under the laws of the State of California that the  
14 foregoing is true and correct and that this document was executed at San Francisco, California on  
15 May 7, 2009.

16 Jennifer Doctor  
17 (typed)

16   
17 (signature)

1 EDGAR B. WASHBURN (#34038)  
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3 SHAYE DIVELEY (#215602)  
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4 MORRISON & FOERSTER LLP  
425 Market Street  
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Telephone: 415.268.7000  
6 Facsimile: 415.268.7522

7 Attorneys for Petitioners  
JULIO CESAR PALMAZ and AMALIA B. PALMAZ,  
8 TRUSTEE OF THE AMALIA B. PALMAZ LIVING TRUST

9  
10 BEFORE THE STATE WATER RESOURCES CONTROL BOARD  
11

12 IN THE MATTER OF THE PETITION OF:

SWRCB/OCC File

13 JULIO CESAR PALMAZ and AMALIA B.  
14 PALMAZ, TRUSTEE OF THE AMALIA B.  
15 PALMAZ LIVING TRUST

**DECLARATION OF AMALIA  
PALMAZ IN SUPPORT OF  
PETITION AND REQUEST FOR  
IMMEDIATE STAY**

16  
17  
18 I, Amalia Palmaz, declare as follows:

19 1. I am over the age of 18 and if called as a witness I could and would competently  
20 testify as follows.

21 2. I currently serve as President of Palmaz Vineyards and am responsible for the day-  
22 to-day management of the winery and vineyard operation.

23 3. I, along with my husband, am one of the recipients of the Requirement for  
24 Technical Information ("Technical Report Order") issued by the Executive Officer of the San  
25 Francisco Bay Regional Water Quality Control Board ("Regional Board") on April 10, 2009. I  
26 received notice of the Technical Report Order on or about April 15, 2009.

27 4. The Technical Report Order sought certain "technical information" related to the  
28 Palmaz Vineyard and Winery, specifically (1) the total cost of building of winery ("Winery  
sf-2676549

1 Property") and (2) the name of any grape varieties currently cultivated on the neighboring 1400  
2 foot elevation vineyard ("1400 Vineyard Property"), and their current and projected yields. The  
3 Technical Report Order required such information by May 1, 2009. The Order further stated that  
4 any noncompliance would be considered a violation of the Water Code and may result in the  
5 imposition of civil liability.

6 5. In an attempt to cooperate with the Regional Board, I directed the collection of  
7 certain information in response to the Technical Report Order: (1) the costs of disposal of the  
8 cave tailings on the 1400 Vineyard Property and (2) the grapes currently grown on, and current  
9 and projected yields from, the 1400 Vineyard Property. We did not collect information on the  
10 total cost of building the winery because the overbroad request sought proprietary information  
11 that could not conceivably be related to any current or future discharge of waste. Compliance  
12 with the Technical Report Order would have required the submission of confidential information  
13 on the winery, the disclosure of which could not have be "undone" should the Petition be  
14 successful. Moreover, the time period provide by the Technical Report Order was unreasonable,  
15 particularly given that the information requested was not readily available and would have be  
16 created especially for responding to the Order.

17 6. We will be substantially harmed if a stay is not issued during the State Board's  
18 consideration of the Petition. The Regional Board has threatened to assess penalties or other civil  
19 liability for any noncompliance with the Technical Report Order, which is completely lacking in  
20 foundation and legal support. A stay is necessary to avoid this significant risk of harm.

21 I declare under penalty of perjury under the laws of the State of California that the  
22 foregoing is true and correct and that this document was executed on May 7, 09, at  
23 Napa, California.

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AMALIA PALMAZ

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**CERTIFICATE OF SERVICE**

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on May 7, 2009, I served a copy of:

**DECLARATION OF AMALIA PALMEZ IN SUPPORT OF PETITION  
AND REQUEST FOR IMMEDIATE STAY**

☒ **BY U.S. MAIL** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105-2482 in accordance with Morrison & Foerster LLP's ordinary business practices. I am readily familiar with Morrison & Foerster LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of Morrison & Foerster LLP's business practice the document(s) described above will be deposited with the United States Postal Service on the same date that it (they) is (are) placed at Morrison & Foerster LLP with postage thereon fully prepaid for collection and mailing.

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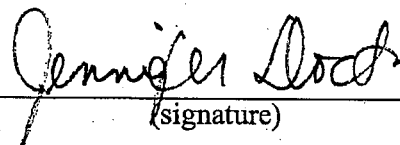
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed at San Francisco, California on May 7, 2009.

Jennifer Doctor  
(typed)

  
(signature)